No. 2618

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

K. V. KRUSE and R. BANKS, copartners doing business under the firm name of "KRUSE & BANKS SHIPBUILDING COMPANY" (a corporation), on behalf of themselves and their underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY, INC., JAMES H. HARDY, HANS MICHELSON, MRS. F. RULFS and DR. ALEXANDER WARNER, claimants of the American steamer "Hardy", her tackle, apparel and furniture,

Appellees.

BRIEF FOR APPELLANTS.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellants.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2618

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

K. V. KRUSE and R. BANKS, copartners doing business under the firm name of "KRUSE & BANKS SHIPBUILDING COMPANY" (a corporation), on behalf of themselves and their underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY, INC., JAMES H. HARDY, HANS MICHELSON, MRS. F. RULFS and DR. ALEXANDER WARNER, claimants of the American steamer "Hardy", her tackle, apparel and furniture,

Appellees.

BRIEF FOR APPELLANTS.

This is an appeal from a decree of the District Court for the Northern District of California dismissing a libel against the steamer "Hardy" for negligent towage,

by reason of which libelants' (appellants') barge was lost, went ashore and had to be salved and repaired. We will first state the clear and undisputed facts and then outline our contentions, under which we can easily take up the few disputed facts and the questions of law applicable to the same.

General Statement of Undisputed Facts.

It is either admitted or absolutely established that the master of the steamer "Hardy" undertook to tow a barge, which had been built by the libelants, from Coos Bay to San Francisco; that she left Coos Bay with said tow (which had no one on board) at about 5 p. m. on September 5th, 1913; that said barge was in all respects staunch, strong and seaworthy and an especially easy barge to tow; that it was equipped with a proper light with sufficient oil to burn for sixty hours, and that extra oil was supplied by libelants to be used when that gave out; that said light went out at about 6:15 p. m. on said September 5th and was not thereafter relit; that at some time during the night of September 6th, or the very early morning of September 7th before 1 a. m., the tow line parted and the barge went adrift; that no search was made for said barge before at least 6 a. m. of September 7th (Record, pp. 133-134); that at 11:15 a. m. of September 7th the search was given up and the "Hardy" proceeded to San Francisco, where she arrived on September 8th, thus having been occupied about 61 hours on the voyage. The barge later drifted ashore on the rocks near Caspar, just below Fort Bragg, and was

badly damaged. She was salved by the steamer "Brunswick" for $1,000 and brought into San Francisco (pp. 94-95) where she was repaired (p. 96).

The Lower Court's Decision.

The decision in the case, rendered several months after the trial, is very brief and reads as follows:

> "In this case my conclusions are as follows:
>
> 1. That libelants furnished the hawser to the steamer 'Hardy' for the purpose of towing their barge to San Francisco, and that the 'Hardy' was not responsible for the parting of such hawser, which was the real cause of the loss of the barge;
>
> 2. That it was for the captain of the 'Hardy' to determine whether or not light on the barge could have been relighted without danger of losing his men in the attempt, and the evidence shows that the possibility of such danger was so great that the court will not review the action of the captain in that regard.
>
> 3. The loss of the barge under all the circumstances was discovered as seasonably as could reasonably be expected.
>
> 4. The 'Hardy' was not negligent in failing to keep up a longer search for the barge.
>
> For these reasons a decree will be entered in favor of respondent" (pp. 170. 171).

The Assignment of Errors.

This assignment is as follows:

> "I.
>
> That the court erred in holding and deciding that the libelants furnished the hawser to the steamer

'Hardy' for the purpose of towing their barge to San Francisco, and that the 'Hardy' was not responsible for the parting of such hawser; and in not holding and deciding that the master of the 'Hardy' himself furnished said hawser and in not holding the 'Hardy' responsible for the parting thereof.

II.

That the court erred in holding and deciding that the parting of said hawser was the real cause of the loss of said barge.

III.

That the court erred in holding and deciding that the possibility of danger in relighting the light on the barge was so great that it would not review the action of the master of the 'Hardy' in not relighting the same, and in not holding and deciding that the 'Hardy' was negligent in not relighting said light and that such negligence was one of the proximate causes of the loss of libelant's barge.

IV.

That the court erred in holding and deciding that the loss of the barge was discovered by those on board the 'Hardy' as seasonably as could reasonably be expected, and in not holding and deciding that the 'Hardy' was negligent in not sooner discovering the loss of said barge and that such negligence was one of the proximate causes of the loss of said barge.

V.

That the court erred in holding and deciding that the 'Hardy' was not negligent in failing to keep up a longer search for said barge, and in not holding and deciding that the 'Hardy' was negligent in this respect, and was also negligent in making an absolutely insufficient search for said barge, and that said negligence was one of the proximate causes of the loss of said barge.

VI.

That the court, in holding that the 'Hardy' was not negligent in failing to keep up a longer search for said barge, failed wholly to note that the 'Hardy's' only excuse in that respect was that she had insufficient fuel oil to do so, and in not holding and deciding that such insufficiency rendered the 'Hardy' unseaworthy for her voyage with said barge in tow, and hence rendered her liable for the loss of said barge.

VII.

That the court erred in not holding and deciding upon the pleadings and the evidence that the 'Hardy' was responsible to libelants for the losses suffered by them in the above cause.

VIII.

That the court erred in making, rendering and entering a final decree herein dismissing the libel with costs, and in not making, rendering and entering an interlocutory decree in favor of libelants referring the case to a Commissioner to ascertain the damages of libelants (pp. 174-176).

Contentions of Appellants.

Under the foregoing assignment we shall contend:

1. That, under the circumstances of this case, the burden of proof was on the "Hardy" to relieve herself from a presumption of negligence, which said circumstances placed upon her.

2. That the court's finding that the libelants furnished the towing hawser introduces an immaterial element into the case, and that its further finding that the parting of the hawser was the proximate cause of the loss of the barge is clearly erroneous We shall

also take up in this connection the contention of appellees that the libelants assmued all risks of the towage.

3. That the "Hardy" was negligent in not relighting the light on the barge after it went out.

4. That the "Hardy" was negligent in not sooner discovering that the barge was adrift.

5. That the "Hardy" was *grossly and inexcusably negligent* in failing to make a proper or sufficient search for said barge, and that her only excuse for not so doing, if correct, rendered her unseaworthy for her voyage and hence equally liable.

We believe that the arguments to be advanced under the foregoing headings will show that libelants have a just and meritorious case, which calls for a reversal of the decree.

I.

THE BURDEN OF PROOF WAS ON THE "HARDY".

It is admitted that a ship undertaking a towage service is neither a common carrier nor an insurer, but is simply bound to use ordinary care. The rule is well stated by the Supreme Court as follows:

> "The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care and to exercise them in everything related to the work until it was accomplished. *The want of either in such cases is a gross fault*, and the offender is liable

to the extent of the full measure of the consequences."

The Margaret, 94 U. S. 494; 24 L. Ed. 146, 147.

In the case of *The Pejepscot,* 217 Fed. 150, 152, Judge Hale says of the master of a towing vessel:

> "He must use the ordinary prudence and judgment *called for by the circumstances of the case.* If the duty undertaken by him is difficult, *he must use commensurate care and skill.*"

It is true that in ordinary cases the burden of proving negligence rests on the tow, although it is very often held in such cases that very little evidence is necessary to sustain such burden of proof (*28 Encyc. Law,* 2 ed., p. 275). It has been held, however, that where a tow which has no one on board, arrives in a damaged condition, a presumption of negligence arises against the towing steamer, which calls on her for an explanation.

The Seven Sons, 29 Fed. 543, 544.

See also

38 Cyc., 585, note 64, and cases there cited.

It is submitted that the same rule applies in the case at bar. The tow had no one on board. All the facts in regard to her loss, the subsequent search for her, and the failure to pick her up, rest solely in the knowledge of those on board the "Hardy". It is only fair, therefore, following the above authorities and other well known legal analogies, that the "Hardy" should be called upon for a full and consistent explanation of all that occurred, and that the burden of proof should rest strongly on her to justify herself. We believe, with all due respect to the lower court, that

she not only failed to sustain this burden, but that a clear case of negligence in several respects was made out against her.

II.

THE COURT'S FINDING THAT THE LIBELANTS FURNISHED THE TOWING HAWSER IS IMMATERIAL, AND ITS FINDING THAT THE PARTING OF THE HAWSER WAS THE PROXIMATE CAUSE OF THE LOSS IS ERRONEOUS. HEREIN ALSO OF THE CONTENTION THAT LIBELANTS ASSUMED ALL RISKS OF THE TOWAGE.

The first question which arises in the case is as to who furnished the hawser with which the towing was done, but, as we shall show, this is a very immaterial matter. Captain Michaelson says that Banks agreed to supply the tow line and in fact agreed to take all responsibility off his hands, both of which statements Banks absolutely denies, although he admits that he told him that he (Michaelson) could get a line from the Simpson Lumber Company (Banks, p. 75). Mr. Falkenstein of the latter concern says that Banks called him up and asked "if the 'Hardy' could have a tow line to tow the barge to San Francisco" to which Falkenstein replied that he (Banks) would have to see Captain Simpson about it (Falkenstein, p. 43). Falkenstein only remembers one conversation about a line and knew of another barge being towed later (id., p. 45), and Banks admits that he did apply for a line for the steamer "Iaqua" to tow the second barge with (Banks, p. 76). Moreover, Captain Simpson, when called, did not testify to any application made by Banks

to him for the line, but simply to his telling Falkenstein that it was all right (Simpson, p. 47). He further testified that the captain of the "Hardy", before starting on the trip, asked him "if he was going to charge him for the use of the line" (id). We submit that the captain would hardly have asked this, if Banks had agreed to supply the line, and his explanation as to why he did so is weak and unsatisfactory (Michaelson, pp. 117-118). It is further in evidence that no bill was ever sent to Kruse & Banks for the line (Banks, p. 80) and, moreover, the evidence of Falkenstein that Banks asked him "if *the 'Hardy'* could have a tow line" is hardly convincing evidence that he proposed to pay for such line. We have recited this evidence in order that the court may not be in any way misled as to this issue, for it really has little bearing on the case. It is well settled law that it is the duty of the towing steamer, and not the tow, to see that the towing lines are sufficient in length and quality.

38 Cyc., 569;
The Edwin Terry, 145 Fed. 837, 839;
Re Moran, 120 Fed. 556, 558.

In the last case cited the court expressly held that, even if the tow supplied the line, it still remained the duty of the tug to see that the line was sufficient, saying on this point:

> "The tug then went alongside of the dredge, and received from her an 80 fathom 6-inch line * * * upon the offer of the dredge, as the tug claims; upon the request of the tug's captain, as some of the crew of the dredge state. If the use of this line imputes fault to anybody, as it does not, the master of the tug was the final judge of its sufficiency."

We do not, however, make the contention on this appeal that the "Hardy" was negligent in the use of the hawser in question, for it was apparently a sufficient one. The breaking of hawsers on long tows is an everyday occurrence and one that all tugs should be prepared to meet. The main point we wish to make is that, if anyone has to bear the consequences of the parting of the hawser, it is not the libelants but the "Hardy"—and this irrespective of the question as to who furnished the hawser. It is impossible to tell from the lower court's opinion what importance it attributed to its finding that libelants furnished the hawser, but the finding itself has no significance whatever.

The lower court went much further, however, and found that the parting of the hawser was the proximate cause of the loss of the barge. We quite agree that *if* the "Hardy" took proper precautions to protect her tow *before* the hawser parted, and *if* she made sufficient efforts to save her *after* it parted, then the breaking of the hawser *was* the proximate cause of the loss. *If,* however, the "Hardy" neglected such proper precautions, or omitted such sufficient efforts, the mere parting of the hawser cannot excuse her. A tug's duty to her tow goes much further than the furnishing of a towing hawser, and it does not cease after the breaking of such hawser. Her duty to do all that is possible for the safety of the tow remains continuous from the time the voyage commences until the tow is past all danger. Authorities in this con-

nection will be cited under the last and most important heading of this brief.

The next point we wish to meet before going to the real merits of the case is the claim that it was agreed that the tow should be solely at the risk of libelants. Banks absolutely denies making any such agreement (Banks, pp. 74-75) and all Captain Michaelson says is as follows:

> "I told Mr. Banks that I would take no chances or no risks on that towing. I told him I would do my best and try to get it down, but I would take no risk on it."
>
> Michaelson, p. 106.

We submit that this statement is entirely too vague to constitute a solemn contract that the tow was to be at the risk of the libelants, and we certainly do not feel that the court will find that any such contract was made in view of the positive denial of Mr. Banks, who certainly showed up favorably as a witness in comparison with Michaelson. And it of course goes without saying that the burden is on the "Hardy" to establish that any such agreement was made.

Here again, however, the discussion is rather beside the point, for it is well settled that a towing vessel is responsible for negligence, even though it be expressly agreed that the towing is to be at the tow's risk.

> *The Syracuse,* 12 Wall. 167; 20 Law Ed. 382;
> *The American Eagle,* 54 Fed. 1010;

Re Moran, 120 Fed. 556, 558;
Alaska Com. Co. v. Williams, 128 Fed. 362, 366 (C. C. A., 9th Circuit).

The alleged agreement, therefore, has absolutely no bearing on the issues of this case, but we respectfully submit that Captain Michaelson's testimony in regard to it is simply one of his many exaggerations, which exaggerations discredit his whole story.

III.

THE "HARDY" WAS NEGLIGENT IN FAILING TO RELIGHT THE LIGHT ON THE BARGE AFTER IT WENT OUT.

The first main fault which libelants charge against the "Hardy" is the failure to relight the light on the barge after it went out. In the answer to interrogatory number 8, made, of course, long before the trial, the claimants say that the light went out at about 6:15 p. m. on September 5th, or an hour and fifteen minutes after the "Hardy" left her dock (p. 22). In fact, if the positive testimony of Mr. Kruse to the effect that the barge left at 5:10 p. m. (p. 40) be correct, she made the trip to the bar in an hour and five minutes. The answer to interrogatory number 7 sets out that the "Hardy" made between 6 and 7 knots with the barge in tow (p. 21), which was accelerated in Captain Michaelson's testimony to seven and three-quarters knots (p. 120). Mr. Banks testifies that vessels generally go slow in getting to the bar (pp. 166-167), and he is corroborated by the "Hardy's" log, which shows

not a single trip, besides the one in question, when such fast time was made, and also shows that it generally takes about an hour and three-quarters (Libelants' Ex. C, not printed). The point is that, if the light went out before the bar was reached, there would have been no possible excuse for not relighting it in the inner bay. Captain Michaelson says that "sometimes" he has to hurry up to catch the tide, but he shows no reason why he should not have taken plenty of time on this particular voyage.

Several of appellees' witnesses in this case testify expressly that the light went out while the "Hardy" was going across the bar and the lower court seemed inclined to accept this view, so we shall not further argue this point. We do, however, very seriously dispute the entry in the log opposite 6:15 p. m. reading: "Light on barge went out in crossing the bar. Wind and sea preventing us from lighting it again" (Libelants' Ex. C, not printed. Entries of Sept. 5th). With the aid of a magnifying glass the court will easily note that there has been an erasure here, and it is a fair inference that the original entry simply contained a reference to the wind, weather and sea conditions and that this entry was an afterthought and was in all probability written up for the purposes of this case. It is certainly a somewhat suspicious entry and, taken in connection with the other erasures to be referred to later, it does not give an altogether pleasant odor to appellees' case. Admitting that the light went out on crossing the bar, and that the captain might have put this down, we do not for one moment believe

that it occurred to him then to add the words "Wind and sea preventing us from lighting it again", especially when we consider the lack of any entry of heavy weather on the day following.

Banks testifies in this case that at the time the barge left Coos Bay the weather was good (p. 70). J. Dunson, the keeper of the lighthouse at the entrance of Coos Bay, remembers the "Hardy" going out and stopping outside the bell buoy, and he says that the sea conditions were not bad at all and the wind was light (p. 38). Captain O. P. Britt of the U. S. Life Saving Station at Coos Bay testifies that the condition of the surf *on the bar* was quite moderate and that it was not breaking any (pp. 27-28). He also says that no seas were washing over the barge when she went out, and that in his opinion a boat could have been launched *at sea* off Coos Bay and the tow have been boarded without any risk (pp. 29-30). This is also borne out by the "Hardy's" log which shows "clear" weather and a "moderate sea" from 8 p. m. to midnight on September 5th (Libelants' Ex. C.). It probably also showed the same thing from 6:15 p. m. till 8 p. m. before the entry was rubbed out. We may also add to all this the testimony of Sanne, one of the "Hardy's" crew, to the effect that if it had not been dark they could have managed putting down a boat all right (p. 163). And yet the log says nothing about its being too dark, but simply that the wind and sea prevented the relighting. And finally we have the evidence of Mr. Rosenthal and Mr. Davenport, both reputable business men, to the effect that

Captain Michaelson admitted to them that he did not relight the light because he did not consider it necessary, as the barge was coming along all right, and that he said nothing about it being too rough (Rosenthal, p. 83; Davenport, p. 89). Michaelson himself somewhat bears out this testimony when he says: "Well, it did not exactly worry me a great deal * * * I felt kind of satisfied the tow was in good condition the way she looked to me" (Michaelson, p. 124).

We submit that all of this evidence is overwhelming to the effect that the light could have been easily relit that night, and that the evidence of those on the "Hardy" as to the weather and sea conditions is absolutely discredited by it. Counsel will doubtless claim that it was a matter resting in the captain's discretion and that, if he thought it was too rough to launch a boat, his judgment cannot be questioned. We shall have more to say of this rule later when we come to discuss the main fault of the "Hardy", i. e. her abandonment of her tow entirely. We respectfully submit, however, that the evidence already cited shows that there was no exercise of any judgment, but, on the contrary, shows that Captain Michaelson deliberately chose to go ahead without a light on his tow, simply because he did not want to take the trouble of launching his working boat.

If the court finds the facts to be as we have stated, then we think that negligence sufficient in itself to account for the loss of the barge has been clearly shown. Banks testifies that it is customary to have such lights on barges in towing (p. 78), and Michaelson himself admits that if he had had any chance to relight the light,

he certainly would have done so (p. 110). When Michaelson later hailed the steamer "Beaver", he said that the barge was adrift with no light on her and was a *menace to navigation* (p. 114), although this was explicitly denied by appellees in their answer to interrogatory number 14 (p. 22). Not only was she a menace to navigation, but it was the duty of the "Hardy" to the tow itself to keep the light lit if possible, especially in the night time. The chief engineer testifies in this case that the working of the engines would not be materially affected if the barge went adrift (p. 159) and, if this be so, and the barge was obscured to the "Hardy" by fog or otherwise, the light on her was a very vital matter in order to determine whether she was still in tow. The case at bar also indicates as clearly as any case could the necessity of having the light, for, if she had had a light, her loss would probably have been sooner discovered, and in any event the "Hardy" would probably have been able to have promptly located her. We therefore submit that it was negligence not to have relit the light on the night of September 5th, when, according to the "Hardy's" own log, the weather was clear and the sea moderate (Libelants' Ex. C. Entries of Sept. 5th).

In view of the foregoing we need add very little on the subject of the "Hardy's" continued failure to relight the light on the following day. The members of the "Hardy's" crew testify unanimously that both wind and sea increased and that the conditions were very bad. The court, however, is not bound to accept this testimony and it is certainly contradicted so far as it is humanly possible to contradict such evidence.

In the first place, the "Hardy's" log absolutely fails to discose any such adverse weather and sea conditions, simply stating that the wind was northwest and the weather clear (Libelants' Ex. C., Entries of Sept. 6th), and claimant's answer to interrogatory number 7 shows that she ran 179 miles on that day or almost 8 miles an hour (p. 21). This is most potent evidence, and Captain Michaelson himself admits that the bad conditions *should* have been recorded in the log (p. 125). They will be found to have been so recorded on other occasions. In the second place, Captain Britt cheerfully admitted in response to appellees' cross-examination that seas would wash continually over the barge in rough weather (p. 29); yet Captain Brennan of the "Watson" says that there was no water in the barge when he saw her the next day (p. 57). It is certainly a remarkable fact that she shipped no water if the conditions were as testified to by the "Hardy's" crew. In the third place, we have the testimony of Captain Pillsbury that, after the barge was salved, both ends of her bridle parted (a much more serious situation than the breaking of a hawser) while she was being towed down in a water logged condition by the "Brunswick" and that, despite heavy seas and a northwest wind, the "Brunswick" succeeded in picking her up (pp. 101-102). As the complement of this we have Captain Brennan's testimony that when he saw her he could have got aboard without any trouble (p. 56). As he expressly put it: "If I was going south, I would have picked her up, believe me; she looked good to me" (p. 55). And finally we have the testimony of Captain Arthur Self that he left Coos Bay on the "Iaqua" the morning after the "Hardy" did

and arrived in San Francisco about the same time, and that during the voyage the weather was comparatively calm, with a smooth sea throughout (p. 23). We therefore submit that the "Hardy's" story as to the weather and sea conditions is not only discredited by her own log, but by independent unbiased testimony; that she could at any time have relit the light on the barge and that her not doing so was negligence, but for which the loss of the barge might well have been averted.

In the lower court counsel for appellees claimed that it did not follow that the light would not have gone out again if relighted, and that, therefore, the failure to relight it was not the proximate cause of the loss. If it was the duty of the "Hardy" to keep a light lit on the barge, which it was towing at the end of a six hundred foot hawser, the failure to so keep it lit was a breach of legal duty. Why was the light placed on the barge at all if it was not to be kept lit? And how can it be assumed that it would have gone out again if it had been relit? The point is that the "Hardy" failed in her full duty to the barge, and it is not for her to be allowed to resort to conjecture and say that the loss *might* have occurred even if she had performed her full duty.

IV.

THE "HARDY" WAS NEGLIGENT IN NOT SOONER DISCOVERING THAT THE BARGE WAS ADRIFT.

The second point which we make against the "Hardy" in this case is that she failed to discover that the barge was adrift as soon as she should have and thus lost her

best chances of promptly locating and saving her. The entry in the log on this subject is as follows:

"Discovered
12:40 Tow Line Parted. Ship was at once
1:00 Hove to. Engines working dead slow" (Libelants' Ex. C).

In this instance no magnifying glass is needed to show an erasure, and the fact that there was an erasure is also shown by the entry of different times to connect a single sentence. Captain Michaelson got into trouble in explaining *when* he made this correction (pp. 130-131, 140), and he could not tell what was in the log before, nor does the magnifying glass disclose this. To say the least, the action is a trifle shady and it lends verity to libelants' testimony on the subject. Mr. Davenport says that the line he saw on the "Hardy" was very badly frayed for from 12 to 14 feet and had the appearance of having been towed in the water for a very long time (pp. 88, 91), and he is, to a certain extent, corroborated by Mr. Rosenthal (pp. 83-84). Mr. Davenport also says that the captain of the "Hardy" told him that he had no lookout aft watching the hawser (p. 89). Appellees' witnesses testify that there was such a lookout, but this testimony is open to grave suspicion for reasons already shown. Moreover, while appellees called the alleged lookout who was on watch up to 12 p. m. on the night in question, they absolutely failed to produce the lookout who was on duty when the barge is said to have broken adrift. The only explanation of this in the record is that one witness *thought* that he was not still with the "Hardy" (p. 160). But this is not the only

coincidence as regards witnesses. While the chief engineer glibly testified that the engines would give no indication of when the tow broke loose, the engineer on watch, though still on the "Hardy", was not called as a witness. The excuse for this was that he could not leave the "Hardy", unless work was stopped (Knudsen, p. 159), which is no excuse at all. The failure to call these very important witnesses clearly raises the presumption that their testimony would have been unfavorable to the appellees.

See

The Joseph B. Thomas, 81 Fed. 578, 583;
16 Encyc. Law, 2 ed., 1017.

We submit that Mr. Davenport's evidence, in connection with the erasure in the log and the failure to call two vital witnesses, makes it very apparent that the barge was lost for a considerable period before her loss was discovered, which obviously shows that no proper lookout was kept. It is true that Hultgren, the mate, testifies that he saw the barge astern at about 12:20 a. m. (pp. 145-146), or about fifteen or twenty minutes before her loss was discovered. We doubt the credibility of this evidence, but, even if it be true, there are still fifteen or twenty minutes unaccounted for. Moreover, it was *he* and not the lookout who later discovered that the barge was adrift (p. 146), showing that the latter was not attending to his job.

We submit that the inference is inevitable that the loss of the barge would have been promptly discovered if a proper lookout had been kept, and that it could easily have been located and rescued. It should here be noted

that the "Hardy's" own log discloses clear weather and a moderate sea at the time in question (Libelants' Ex. C, not printed).

V.

THE "HARDY" WAS GROSSLY NEGLIGENT IN FAILING TO MAKE A PROPER OR SUFFICIENT SEARCH FOR THE BARGE, AND HER ONLY EXCUSE FOR ABANDONING THE BARGE, EVEN IF TRUE, RENDERED HER UNSEAWORTHY FOR HER VOYAGE AND HENCE EQUALLY LIABLE.

The above is the main point in this case. It is our contention that the "Hardy" made an absolutely insufficient search for the barge and abandoned her under most reprehensible circumstances. The lower court found that there was no negligence in this respect, but apparently wholly failed to consider in this connection the utter insufficiency of the excuse offered for such abandonment, to wit: lack of enough fuel oil to permit of further delay.

According to the evidence of the appellees the barge broke adrift at about 12:40 a. m. on September 7th, and the "Hardy" immediately hove to, turned around and proceeded northward until daylight, when she started back to look for the barge, although, according to the log, there is no record of her starting south again till 7:25 a. m. (Libelants' Ex. C, Entries of Sept. 7th). The evidence also is that the night was very dark, but the log shows that the atmosphere was clear and the sea moderate (Id.). Captain Michaelson of course testifies that it was too windy and rough for him to remain where he

was with a loaded vessel and that he had to go north, which argument has already been met in dealing with the previous proposition. The captain admits that he made no search for the barge that night, saying, "There was no use searching at night for a barge *without a light*" (p. 133); yet, according to the answer to interrogatory number 4, "the efforts (to locate the barge) were continued from 12:40 a. m. until about 11:15 a. m., in all about 11 hours" (p. 21). If our argument on our last point is sound there was no excuse for proceeding north and not at once searching for the barge, but we shall now proceed on the assumption that the wind and sea conditions during the night were as testified to, and that the captain was justified in going north.

The captain further says that when daylight set in it was foggy, though the log shows no fog until 9:10 a. m., and he cheerfully explains his report to the Collector of Customs to the effect that at "8 a. m., same date, fog lifted, and I continued to search for the barge" (report attached to interrogatories, p.14) by saying that it is true that it lifted, *but it only lifted for half an hour* (p. 135), a conclusion no honest man could draw from the report. Even on the assumption, however, that it continued foggy till 11:15 a. m., we find the following remarkable situation as testified to by Captain Michaelson:

> "Q. Did it begin to clear at 11:15 a. m., as noted in the log?
>
> A. At 11:15 a. m. it was clearing, that is, you could not call it clear, but it is what we would call clear enough that we did not have to blow our steam whistle.
>
> Q. It was cleared up?

A. It was clear enough so that we did not have to blow our steam whistle. We could see for a mile or two around us.

Q. *That was the very time you started back to San Francisco, was it not?*

A. *That was the very time.''*

Michaelson, p. 136.

In other words, instead of conserving his energies and waiting for it to clear, the captain made a gallant search for the barge in the fog, until it cleared up, and then made a bee line for home.

If the captain had stayed around a little after the weather cleared there can be no doubt, in our opinion, but that he would have found the barge. Captain Brennan of the ''Watson'' sighted her at 7:05 a. m. on September 7th right in the fairway and about two miles outside of him (p. 52), and it will be noted that the ''Watson'' passed the ''Hardy'' at about 8:30 a. m. about a mile *inside* of her (Michaelson, p. 114). Moreover, the barge was just about where she should have been expected to be at that time, having drifted about 7 miles (Pillsbury, pp. 96-97). A most cursory search after the weather cleared would surely have discovered her, yet the ''Hardy'' made no efforts in this direction.

It is claimed, however, that the search was not continued because the ''Hardy'' was short of fuel oil and this is the only excuse offered for giving up the search. It makes little difference in this case whether this excuse is true or false, as we shall endeavor to show later. We believe, however, that it is false. Mr. Davenport expressly testifies that the captain told him that he had oil enough (p. 89), and Captain Michaelson's denial of this

conversation is not very emphatic (p. 115). It is also rather suspicious that, although the chief engineer testified that he sounded the tanks that morning after searching for the barge and found about 60 barrels (p. 155), and although Captain Michaelson said that he knew at 11 a. m. that there were then 60 barrels (p. 137), yet, when libelants asked "How much fuel was on board the 'Hardy' at 11 a. m. on September 7th, 1913?" (interrogatory number 9, p. 14), they received the reply "We cannot say" (answer to same, p. 22). This was neither a fair nor a correct answer, if the facts are as stated by Michaelson and his engineer, but it is certainly an admission at least equivalent to one made in a pleading, and libelants were entitled to take it as true and are entitled to take it as true still. And, if this be so, Michaelson's evidence that he did not have enough fuel oil is utterly discredited, for the answer in question shows that he did not know how much he had. It is our belief that there was *ample* fuel oil and that the testimony to the contrary is false.

Captain Michaelson further testifies that on a trip from Coos Bay to San Francisco the "Hardy" ordinarily carries between *260* and *280* barrels of oil (p. 137), and the engineer says that he would not start for San Francisco with less than from 130 to 140 barrels (p. 158). And Michaelson further says that the "Hardy" uses 42 barrels a day more or less (p. 137). As the voyage in question took only *61 hours,* or two and a half days, we are entirely unable to understand how the "Hardy" ran short, since even on the engineer's estimate she should have had enough oil to steam

on for three and a half days. And it will not do to say that her having a tow made her burn more oil, for the engineer is careful to state that having the barge in tow made practically no difference in the revolutions of the engines (pp. 158-159). All of these facts make it still more clear that there was undoubtedly ample fuel oil on board and that the excuse made was a petty subterfuge to escape responsibility.

We now propose to grasp the other horn of the claimants' dilemma and to proceed on the assumption that the "Hardy's" testimony is true and that she did not *in fact* have enough fuel oil to permit a further delay. If so, she was unseaworthy for her voyage and cannot escape responsibility under her own testimony *(The Undaunted,* 5 Asp. 580, cited *infra).* The voyage in question only took 61 hours, part of which was consumed in steaming at *very slow speed,* as is clearly shown by the log (Libelants' Ex. C) and by Captain Michaelson's testimony on direct examination (p. 112). On cross-examination, when he first saw the purport of this evidence, he tried very lamely to bring his speed up to half speed (pp. 133-134), which testimony, even if true, as it clearly was not, would make very little difference in the case. Michaelson further says: "Sometimes it takes me *seventy-two* hours to come from Coos Bay and sometimes I come in forty hours depending on how I strike the weather" (p. 137); yet, although he thus necessarily needed enough oil to last at least 72 hours; although he had a barge in tow which *might* break adrift, and although the voyage in fact only took

61 hours, he did not have enough fuel oil. Such a situation needs no further comment.

The charge of negligence in sending out an unseaworthy vessel does not even end here, however, for Michaelson says that he did not even ask the chief engineer whether he had oil enough (p. 138), and the chief states that he cannot tell how much oil he had for this trip (p. 157). In fact, when he started on his voyage from San Francisco and filled his tanks, *he did not even know that the "Hardy" was to tow a barge from Coos Bay* (p. 158), which Michaelson should certainly have told him. Finally, if the "Hardy" did not have enough fuel oil to get to San Francisco, she could have gone to a nearer port like Fort Bragg and have got some; instead of which she chose to utterly abandon her tow under no compelling necessity therefor.

In the lower court counsel for appellees contended that Captain Michaelson's testimony as to carrying from 260 to 280 barrels of oil referred to the *round trip* from San Francisco, but the testimony does not support this contention in any way (p. 137). From this he argued that it was prudent to carry 130 barrels on the trip from Coos Bay alone. He then proceeded to point out that, as the "Hardy" had been at sea for 42¼ hours at 11:15 a. m. on September 7th, and as she used 42 barrels a day, she must then have used 74 barrels, and, as she then had 60 barrels left, she must have had 134 barrels for the trip, which was ample for a voyage lasting 72 hours. He then circumnavigated the fact that the voyage in question only took 61 hours by stating that it was necessary to have a

large balance of oil on hand to meet *emergencies* which might arise. This argument not only fails to take into account the fact that from 1 a. m. to 7:25 a. m. on September 7th the "Hardy" was proceeding at "slow" and "dead slow" speed, and therefore could not have used the customary amount of fuel oil, but, accepting it fully, it constitutes the striking admission that, although taking a tow for the first time, the captain had only just enough fuel oil to *safely* complete his voyage and yet he completed it in *61 hours.* This hardly constituted due diligence to make the ship seaworthy for a kind of voyage she had never taken before. Moreover, *why* did she have to go on to San Francisco at once? Why could she not have saved her tow and taken her into Fort Bragg? Counsel undertook to claim that there was no fuel oil to be had in Fort Bragg, although there is not a word of testimony in the record to this effect. Even if it were true, however, the "Hardy" could have waited at Fort Bragg for fuel oil to be sent up there, or she could have at least sought other assistance for her tow. The sole reason she did not do these things was that it seemed more important to her to attend *to her own business.* Admitting her right to so decide, it is inevitable that she must bear the consequences, for nothing is better settled than that the duty to fulfil other engagements does not justify the abandonment of a tow. As said by Judge Morrow in *Jacobsen v. Lewis Klondike Expedition Co.,* 112 Fed. 73, 77, cited infra:

> *"The 'reasonable care and skill' required by law in the performance of the towage contract was not diminished or waived by the added undertakings.* It was incumbent upon the Noyo to perform all the conditions of her contract with the Evans with the same degree of care and skill as would have been required of her had the towage contract been *the only object and purpose of the voyage."*

On the question of the necessity of having a sufficient supply of fuel on board a towing vessel, the case of *The Undaunted,* 5 Asp. Mar. Cases, N. S., 580, 581, is strongly in point. The court there says:

> "This is an action arising out of a towage contract to tow the ship 'Undaunted' from Havre to Cardiff. The tug was not at Havre at the time when the contract was entered into, but in pursuance of the contract she proceeded to Havre, and there took the 'Undaunted' in tow on the 26th April, 1884. When off Trevose Head, which is some 70 miles from Cardiff, it was found there were only 15 tons of coal remaining on board the tug. Her master did that which was probably prudent and right under the circumstances. With the approval, so far as I can gather, of the master of the tow, he cast off and went to Swansea to procure a fresh supply of coal. The 'Undaunted' in the meantime was put under canvas, and is said to have beat to the northward, but probably she did not materially alter her position before the tug came back on the following day. Arguments have been directed as to the quantity of coal the tug had on board at the time she left Havre, and on the evidence I come to the conclusion *that she was not properly or adequately supplied. It is a matter of very great importance that steam-tug owners should not be released from the obligation which is incumbent upon them to provide adequately and properly equipped tugs, because the consequences of having to cast a vessel*

off in the middle of the towage may be of the very gravest kind. It may involve not only serious danger to property, but also to life. If a tug were to cast off a ship in a gale of wind and on a lee shore in order to go and procure coal, the consequences would be serious. Therefore I am not disposed to diminish the responsibility of the tugowners in that respect.

With regard to the circumstances of this case, I have no doubt that the weather was worse than the captain of the tug anticipated before he started on the voyage. I am not prepared to say that it was worse than he had reason to expect, but at the same time I have no doubt that the weather was bad, and that when the tug cast off they had been practically making no way at all. It is said that, assuming the coal on board on starting from Havre to have been inadequate, it is not a matter for which the tugowners are responsible, for by the terms of the card, which is said to have been incorporated in the contract, they are not responsible for the negligent acts of the master. I do not think, however, that that can avail the plaintiffs in this case, because there is an implied undertaking on the part of tugowners to supply an efficient tug, including sufficient equipments *and a proper supply of coal, and if the tug was—as I find it was—deficient in this respect, it is a matter for which the tugowners are liable,* notwithstanding the exceptions in the card."

We submit that the showing made on this question of fuel oil is a most convincing showing of negligence on the part of the "Hardy". This is not a case of mere errors of judgment or of the exercise of a sound discretion, but of *positive, active negligence.* Either Captain Michaelson had enough fuel oil on board and abandoned his tow after a brief, futile and ineffective search for her or else his vessel was absolutely unsea-

worthy for a voyage which might well have lasted 72 hours even without a tow, and which was in fact completed in 61. Moreover, the lack of enough fuel oil to take the *"Hardy"* to *San Francisco* is not a proper criterion of her right to desert her tow while near another safe port.

We believe that the foregoing discussion renders the citation of cases unnecessary and we shall only refer to a few. Each towage case depends largely on its own peculiar circumstances and it is not easy to argue from one case to another. The general principle applicable to the subject of abandonment of tows is well stated as follows:

> "(2) PERMANENT ABANDONMENT.—A tug does not warrant that she will be able to complete the voyage under all circumstances and hazards, but only that she will use her best endeavors to do so. Where the voyage is abandoned on account of obstacles which the tug does not undertake to overcome, there still remains the obligation to take reasonable care of the tow *and not to leave it until it is in a place of safety;* unless, of course, that becomes impossible or perilous to do, *as where the tow is sinking or past saving or the tug is injured or in great danger.*"
>
> *28 Am. & Eng. Encyc. of Law*, 2 ed., p. 269.

The following statement as to the law of towage by this court in *Jacobsen v. Lewis Klondike Expedition Company,* 112 Fed. 73, 77, is also in point in view of the fact that the "Hardy" was carrying lumber and the towage was only subsidiary:

> "It is well-settled law that the towing vessel is bound to exercise reasonable care and skill in the performance of the duty assumed, and that

failure therein will create liability for any injury resulting. The Webb, 14 Wall. 406, 414, 20 L. Ed. 774; The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Burlington, 137 U. S. 386, 392, 11 Sup. Ct. 138, 34 L. Ed. 731. Did the Noyo in this case fail to perform such duty? A somewhat different state of facts is presented than in the usual controversy for breach of a towage contract. Ordinarily the sole purpose of the towing vessel is to take her tow safely and expeditiously to the point of destination. But in this case there was an added purpose. In fact, it is perhaps questionable whether the towing of the vessels was not deemed of secondary importance to the main business of transporting passengers and freight as quickly as possible to the port of discharge. The steamer Noyo was not a tug, whose sole business was that of towing. It was a steam schooner, about 100 feet in length, engaged in the transportation of freight and passengers between Seattle, Wash., and St. Michaels, Alaska. At that time the great rush to the Klondike was under way, and vessels of every description were pressed into service for all Alaskan points, the supply being wholly inadequate. River boats were in great demand on the Yukon, and all possible means taken to get such boats to the entrance to the river at St. Michaels. The Noyo, under this stress of circumstances, undertook to tow for more than 2800 miles two boats aggregating three times her own length, loaded with coal and Alaskan supplies, in addition to carrying the load in her own hold. Part of this voyage was necessarily by way of the open sea. Such an undertaking called not only for great power on the part of the towing vessel, *but enlarged the measure of her duty to cover the increased risk of disaster, and to meet the conflicting interests of her various contractual engagements,* namely, the two contracts of towage, and the agreements with respect to her own passengers and cargo. *The 'reasonable care and skill' required by law in the performance of the towage*

contract was not diminished or waived by the added undertakings. It was incumbent upon the Noyo to perform all the conditions of her contract with the Evans with the same degree of care and skill as would have been required of her had the towage contract been the only purpose and object of the voyage.''

As has been before pointed out, we cannot but believe that the ''Hardy'' left her tow mainly to carry out her other engagements and, if so, her conduct does not measure up to the standard above laid down. We might also add that if, as was claimed in the lower court, the 'Hardy's'' large deckload of lumber made it necessary for her to turn around and proceed north till daylight instead of simply heaving to, this necessity for the protection of her cargo engagements does not excuse her desertion of the barge at that time.

In the case of *Appeal of Cahill,* 124 Fed. 63, 64, the following applicable language is used in regard to the duty of a tug to her tow:

> ''Even if the circumstances had been sufficient to justify the master of the tug in cutting loose from the dredge in order to take off the men, they did not justify him in deserting her and her scows, and allowing them to be beached without any effort to save them. We are satisfied there was a reasonable chance that they could have been saved if the tug had resumed charge of them. Their owner was entitled to the benefit of the chance, and as he had been deprived of it by the conduct of the tug, in disregard of her duty to use all reasonable efforts for the preservation of her tow, *the tug must respond for the consequences, in the absence of clear proof that her efforts would have been ineffectual.* Upon this branch of the case we fully concur in the opinion of the court be-

low, and do not deem it necessary to express ourselves further.''

The only other case which we care to cite is that of *In re Moran,* 120 Fed. 556. Not only is this case in point on the question of the tug's duty to supply an efficient hawser, and on the proposition that an agreement that the towage shall be at the risk of the tow does not absolve the tug from negligence; but it is also very strongly in point on the question of an improper abandonment of a tow and on the rule, so strongly insisted on by counsel at the trial, as to the discretion of the master of the tug. In that case the tug ''A. Moran'' was towing a dredge. The hawser parted in the night time on the open ocean when there was a gale of wind, blowing 35 miles an hour, and a very heavy swell. The dredge had considerable water in her, her smokestack had fallen in and her crew abandoned her and went on board the tug for safety. After circling round the dredge for a while the tug considered the situation hopeless and left her. On pages 562 and 563 of the opinion the court thus characterizes this abandonment:

> ''The Moran's abandonment of the dredge, and departure for, and delay at, Norfolk, are not excusable, and the fault is emphasized by her indolent and insufficient search. The excuses are (1) that the tug was in danger from the storm; (2) that it was useless to stand by the dredge, as she could not be retaken; (3) that the crew had abandoned the dredge. The first plea is obviously untrue. The weather on the night of the abandonment was doubtless boisterous but several tugs anchored their tows in the general neighborhood of the entrance of the bay and kept near them all night, while the

> Moran within an hour or two of daybreak, and in the face of no greater danger than brave seamen ordinarily encounter successfully, left the dredge to her fate, and not content, even on a flood tide, within the protecting shelter of the Cape, where the light could be awaited for pursuing and taking up the dredge, did not stop until she had reached the utmost security of Norfolk, 40 miles away, where she renounced practically all effort to reclaim her tow."
>
> * * * * * * * *
>
> "There is no intention to suggest that the crew of the tug were cowardly, for they had faced the night almost to its ending; and it is considered that a sense of personal danger for himself, his men, or tug, did not influence considerably the departure of the Moran's captain. But surely his leaving his tow, almost on the edge of the morning, when it was floating successfully, and going 40 miles away, and staying away, showed neither good judgment, fidelity to his charge, nor that sturdy and obdurate endeavor to hold onto his tow that the law should demand under the conditions then existing. *If the master of a tug may regard the tow as lost whenever there is a hard storm and his hawsers break, and the men on the tow come off, then Capt. Ellis was right. Such action is far from the cool judgment and dauntless endeavor to discharge his trust that should characterize the master of an American vessel.*"

As regards the claim that the matter rested solely in the master's judgment, the court said at page 564:

> "The plea is made that the master's judgment is best and should control. That is a rule to be honored in a proper case (The Hercules (D. C.), 75 Fed. 274; The E. Luckenbach, 51 C. C. A. 589, 113 Fed. 1017 affirming (D. C.) 109 Fed. 487; The J. P. Donaldson (D. C.), 19 Fed. 264, 266; The Packer (C. C.), 28 Fed. 156), but should not relieve

offending tugs. When a tug deserts her tow, there ought to be a good reason assigned for it. In the present instance, the master went away without a justifiable motive, without the influence of a warranted apprehension, with his tow afloat and not seriously damaged. He went because he lost hope, and he stayed away for the same reason; yet the evidence does not offer any substantial ground for his hopelessness. Neither danger, nor necessity, nor advantage, nor convenience, constrained the tug to go to Norfolk, or to remain there 17 hours; she obtained nothing but unneeded coal, and, if she needed a hawser, did not even inquire for one, although they were sold there. But whatever she needed she could have obtained in a brief time, and thereupon gone in pursuit. If the shelter of the bay was desirable, and the master was justified in seeking it, how does that excuse him? *To excuse a tug for leaving and remaining away from her tow, there should be proof that the tow was sinking, or past saving, or that the tug was so injured or in such danger that it could not stay or return, or similar condition.* Several cases are cited, which do not absolve the Moran, for, where they favor the tower, either the tug was injured or in danger, or the tow was beyond conservation, and departure was justified and return excused."

This language is peculiarly applicable to counsel's contention in the case at bar.

We finally wish to cite from this case a quoted passage from *MacLachlin on Merchant Shipping.* This appears on pages 566 and 567 of the opinion and reads as follows:

> "But there is no implied warranty on the part of the tug to bring the tow to the point of destination under all circummstances and at all hazards. The Minnehaha, 30 Law J. Adm. 211. She engages to use her best endeavors for that purpose; but

she is relieved from her obligation if she be prevented by vis major, or by accidents not contemplated, which render performance of her contract impossible. The Minnehaha, 30 Law J. Adm. 211.

"She is not relieved, however, from her obligation because unforeseen difficulties occur in the completion of her task—because the performance of her task is interrupted or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if, in the discharge of her task, by reason of the sudden violence of winds or waves, or other accidents beyond the control of and without default in the tug, the tow is placed in danger, and the tug incurs risks and performs duties which were not within the scope of her original engagement, she is entitled, on proof of this, if the ship be saved, to claim as a salvor instead of being restricted to the sum stipulated for mere towage. The Minnehaha, supra; The Pericles, Brown & L. 60. The Charles Adolphe, Swab. 153; The Albion, Lush. 282; The Rober Dixon, 42 Law T. (N. S.) 344. Such a remuneration under the supposed circumstances becomes her right; *but in such circumstances it is not optional with her whether she will render the services—she is bound to do so.* This is implied in her original contract, from which she is not relieved except by circumstances of difficulty that render the performance of it impossible. The Saratoga, Lush. 318; The Minnehaha, supra; The White Star, L. R. 1 Adm. & Ecc. 66."

We submit that this case is very strongly in point and shows as clearly as any case could that the abandonment of the barge by the "Hardy" in this case was absolutely unjustifiable. Captain Michaelson's conduct hardly measures up to the standard required of the master of an American vessel, and we submit that if it be held that tows can be deserted with such absolute

impunity as this barge was, it will be a reproach to the law governing such situations.

Counsel will doubtless rely, as he did in the lower court, on cases like *The Czarina,* 112 Fed. 541. In that case the Czarina left a raft, which, the court said, it would have been dangerous to pick up, and proceeded to the nearest port, Point Arena. The point is, however, that in that case, as soon as the weather moderated, the master went out again and spent *three days* in the fog, in seas which were still rough, looking for the raft, which he was unable to find on account of the fog. No inference can possibly be drawn from this case which will justify the "Hardy's" abandonment of the barge in the case at bar. Indeed, had she done one-half as much as the Czarina did, there is no question whatever but that the barge would have been recovered.

VI.

CONCLUSION.

We submit in conclusion that the "Hardy" was negligent both in failing to relight the light on the barge and in failing to keep a sufficient lookout. We further submit that she was grossly negligent in abandoning the barge as she did, and that this court should not lend its approval to a principle of towage law which permits the absolute desertion of a tow under such flagrant circumstances as those disclosed in the case at bar. We therefore submit that the decree should be reversed with costs to appellants and that the cause

should be referred to a Commissioner to ascertain the damages sustained by libelants.

Dated, San Francisco,
October 20, 1915.

E. B. McClanahan,
S. H. Derby,
Proctors for Appellants.